

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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DIGENE CORPORATION,

Plaintiff,

v.

THIRD WAVE TECHNOLOGIES, INC.,

Defendant.  
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ORDER

07-cv-022-bbc

Defendant Third Wave Technologies, Inc. has advised the court that it wishes to dismiss its fifth counterclaim for an award of attorney fees pursuant to 35 U.S.C. § 285. It has asked the court for dismissal without prejudice, which would allow defendant to reassert its counterclaim if the court of appeals were to reverse this court's denial of defendant's antitrust counterclaims. The motion will be granted. A dismissal without prejudice will not harm plaintiff Digene Corporation; defendant will be able to reassert its entitlement to attorney fees only if defendant prevails upon appeal.

This ruling disposes of all but a few loose ends that I will address below.

ORDER

1. Defendant Third Wave Technologies, Inc.'s motion for dismissal of its fifth counterclaim for an award of attorney fees (dkt. #282) is GRANTED;

2. Defendant's motion (dkt. #195) to strike the errata sheet relating to the Slattery deposition is DENIED as moot;

3. Defendant's motion (dkt. #209) to strike portions of plaintiff's reply memorandum in support of its motion for summary judgment is GRANTED as to those arguments relating to the Anti-Kickback law; those portions were not considered in deciding the motion for summary judgment; and

4. Defendant's motion to strike the new opinions of Putnam (dkt. #212) is GRANTED; the new opinions were not considered in deciding the motion for summary judgment.

The clerk of court is directed to enter judgment for defendant on plaintiff's complaint and for plaintiff on defendant's counterclaims six, seven, eight and nine.

Entered this 26th day of February, 2008.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge